

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APCC Services, Inc.,
Data Net Systems, LLC
Davel Communications, Inc.
Jaroth, Inc. dba Pacific Telemanagement
Services, and
Intera Communications Corp.,
Complainants,
v.
Advanced Business Telephone,
Defendant.

File No. EB-02-MD-007

ORDER

Adopted: July 10, 2002

Released: July 10, 2002

By the Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau:

1. On April 19, 2002, APCC Services, Inc., et al. ("APCC" or "Complainants"), filed with this Commission a formal complaint against Advanced Business Telephone ("ABT") pursuant to section 208 of the Communications Act of 1934, as amended (the "Act").

1 47 U.S.C. § 208.

2 See 47 C.F.R. §§ 64.1300-64.1320. The Commission promulgated these rules to implement section 276 of the Act, 47 U.S.C. § 276.

3 See APCC Services, Inc. et al. v. Advanced Business Telephone, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer and Edward G. Modell, counsel for Complainants, and Robert Gold, President, Advanced Business Telephone, File No. EB-02-MD-007 (dated May 24, 2002).

2. During a telephone conference with counsel for Complainants held on May 23, 2002, Commission staff indicated that, in light of ABT's failure to participate in this proceeding, Complainants must, on or before July 8, 2002, either withdraw the complaint (in order to file an informal complaint against ABT alleging identical claims), or file a motion for default judgment, and that a failure to take either of these steps may result in a dismissal for failure to prosecute.⁴ On May 24, 2002, Commission staff sent a letter to Complainants and ABT via U.S. mail and by facsimile restating that Complainants must withdraw their complaint or file a motion for default judgment by July 8, 2002, or risk dismissal for failure to prosecute.⁵ This directive was repeated one week later in a separate letter establishing a status conference to discuss Complainants' options in this matter.⁶ Despite these warnings, APCC failed to take either of these steps.

3. It is settled that the Commission will dismiss a complaint for failure to prosecute when the complainant has ceased to pursue its complaint in accordance with the Commission's rules.⁷ In this case, Complainants declined to withdraw the complaint or file a motion for default judgment by the required date, despite a specific notification from Commission staff that a failure to act in this manner might result in dismissal for failure to prosecute. Moreover, Complainants have not requested additional time within which to pursue either of these actions.

4. We view Complainants' failure to withdraw the complaint, or file a motion for default judgment, as an indication that Complainants do not intend to pursue their claim in accordance with the Commission's rules. Under these circumstances, we conclude that dismissal for failure to prosecute is warranted, and that termination of this matter will serve the public interest by eliminating the need for the expenditure of further time and resources by the Commission.

5. Typically, when the Commission dismisses formal complaints for failure to prosecute, it does so with prejudice.⁸ In this case, however, given that the complaint was filed

⁴ *Id.*

⁵ *Id.* (stating that "Complainants must, on or before July 8, 2002 (forty-five (45) days from the date of this letter), either withdraw the complaint, or file a motion for default judgment, and that a failure to take either of these steps may result in a dismissal for failure to prosecute.").

⁶ See *APCC Services, Inc. et al. v. Advanced Business Telephone*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer and Edward G. Modell, counsel for Complainants, and Robert Gold, President, Advanced Business Telephone, File No. EB-02-MD-007 (dated May 31, 2002).

⁷ See, e.g., *Voice Networks, Inc. v. US West Wireless, L.L.C.*, Order, 16 FCC Rcd 4904 (Enf. Bur. 2001); *Nassau Communications Network, Inc. v. National Communications Network, Inc.*, Order, 12 FCC Rcd 15191 (Com. Car. Bur. 1997); *IBEX Ltd. v. New Valley Corporation*, Order, 11 FCC Rcd 14387 (Com. Car. Bur. 1996); *Cellular Marketing Inc. v. Houston Cellular Telephone Co.*, Order, 10 FCC Rcd 8897 (Wireless Bur. 1995).

⁸ See, e.g., *Voice Networks, Inc. v. US West Wireless, L.L.C.*, Order, 16 FCC Rcd 4904, 4906, ¶ 8

merely three months ago, and ABT has not participated in this proceeding, we find that this sanction would be unduly severe. Accordingly, we dismiss the Complaint without prejudice. In this way, we balance our need to manage our docket and the public interest in expeditious resolution of litigation with insignificant prejudice to defendants from delay.⁹ We caution Complainants, however, that, should they refile a Formal Complaint, future instances of failing to adhere to our rulings will result in dismissal with prejudice.

6. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 64.1300-64.1320, and authority delegated by sections 0.111, 0.311, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.720-1.736, that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and that this proceeding IS TERMINATED in its entirety.

FEDERAL COMMUNICATIONS COMMISSION

Radhika V. Karmarkar
Deputy Chief, Market Disputes Resolution Division
Enforcement Bureau

(Enf. Bur. 2001); *Nassau Communications Network, Inc. v. National Communications Network, Inc.*, Order, 12 FCC Rcd 15191, 15195, ¶ 9 (Com. Car. Bur. 1997); *IBEX Ltd. v. New Valley Corporation*, Order, 11 FCC Rcd 14387, 14388, ¶ 4 (Com. Car. Bur. 1996); *Cellular Marketing Inc. v. Houston Cellular Telephone Co.*, Order, 10 FCC Rcd 8897, 8898, ¶ 8 (Wireless Bur. 1995).

⁹ See *Citizens Utilities Co. v. American Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 93 (1979).